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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1957

No. 139

ALVARO ALCORTA,
Petitioner

vs.

THE STATE OF TEXAS
Respondent

On writ of certiorari to the Court of Criminal Appeals of the State of Texas

BRIEF FOR RESPONDENT

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SUBJECT INDEX

	Page
Statutes Involved	1
Questions Presented	3
Statement of the Case	4
Summary of the Argument	7
Argument	13
I. Texas has adequate corrective process	13
II. Petitioner has failed to prove allegations	16
III. Factual determination of State Court	32
IV. Evidence was not admissible	35
V. Federal cases cited by Petitioner, distinguished	45
VI. Cautioning of witness to answer questions	53
VII. Petitioner had equal opportunity to discover facts	55
Conclusion	59

INDEX OF AUTHORITIES

Constitution: Page

Amendment XIV, Constitution of the United States 12, 51, 54

Statutes:

Article 119, Texas Code of Criminal Procedure 1, 14

Article 134, Texas Code of Criminal Procedure 2, 14

Articles 245-266, Texas Code of Criminal Procedure 56

Article 1257a, Texas Penal Code 43

Article 302, Texas Penal Code 17

Article 303, Texas Penal Code 17

Texts:

McCormick and Ray—"Texas Law of Evidence" Section 688 26

44 Texas Jurisprudence—"Witnesses", Section 126 54

3 Wigmore, Evidence, Section 1018 26

Cases:

Anderson Nat'l Bank v. Luckett, 321 U. S. 233 64 S. Ct. 599 53

Bales v. Lainson, 244 Fed. 2d 495 50

Black v. State, 198 S. W. 959 (Tex. Crim. App.) 41

Bridges v. Wixon, 326 U. S. 135, 150 26

Childress v. State, 202 S. W. 2d 930 (Tex. Crim. App.) 44

Fay v. People of New York, 332 U. S. 261, 67 S. Ct. 1613 ..... 10, 33, 51

Fay Roofing Co. v. Wood, 344 U. S. 157, 735 S. Ct. 204 34

Gallegos v. Nebraska, 342 U. S. 55, 72 S. Ct. 141 ..... 10, 17, 33, 36, 52

Griffin v. United States, 336 U. S. 704, 709, 69 S. Ct. 814 ..... 12, 36

Griffin v. United States, 183 Fed. 2d 990 ..... 50, 52

Page

Hall v. State, 158 S. W. 272 (Tex. Crim. App.) 36

Howard v. State, 55 S. W. 2d 1048 (Tex. Crim. App.) 44

King v. State, 286 S. W. 231 (Tex. Crim. App.) 36, 39

Lacy v. State, 128 S. W. 2d 1165 (Tex. Crim. App.) 36, 39

Lisenba v. People of California, 314 U. S. 219, 62 S. Ct. 280 ..... 13, 16, 58

Lovett v. State, 223 S. W. 210 (Tex. Crim. App.) 11, 36, 38, 41

McCune, Ex parte, 246 S. W. 2d 171 (Tex. Crim. App.) 8, 14

Meyer v. State, 41 S. W. 632 (Tex. Crim. App.) 36

Mooney v. Holohan, 294 U. S. 103; 55 S. Ct. 340 45

Mooney, Ex parte, 73 P. 2d 554, 570 ..... 17, 46

Newchurch v. State, 121 S. W. 2d 998, (Tex. Crim. App.) 36, 39

Perea v. State, 227 S. W. 305 (Tex. Crim. App.) 36, 38

Phillips v. State, 2 S. W. 601 (Tex. Crim. App.) 11, 40

Scott v. State, 20 S. W. 2d 426 (Tex. Crim. App.) 44

Scott v. State, 190 S. W. 2d 828 (Tex. Crim. App.) 44

Thompson v. State, 29 S. W. 2d 343 (Tex. Crim. App.) 42

United States Ex Rel Montgomery v. Ragen, 86 Fed. Sup. 382 ..... 11, 49, 55

United States Ex Rel Almeida v. Baldi, 195 Fed. 2d 815 ..... 11, 47, 55

United States Ex Rel Thompson v. Dye, 221 Fed. 2d 763 ..... 11, 46, 55

Weige v. State, 196 S. W. 524 (Tex. Crim. App.) 36, 37

Wheeler v. State, 239 S. W. 2d 105 (Tex. Crim. App.) .. 43

Young v. State, 127 S. W. 1058 (Tex. Crim. App.) 36, 37

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BRIEF FOR RESPONDENT

STATUTES INVOLVED

IN ADDITION TO THOSE CITED BY PETITIONER:

Art. 119, Texas Code of Criminal Procedure

". . . After final conviction in any felony case the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may upon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing. Provided further,

tensively in this petitioner's brief. However, it has no application whatsoever to the facts in this case.

The cited case of *Bales vs. Lainson*, 244 Fed. 2d 495 has no application here. It simply reverses the District Court for failing to grant petitoner a hearing upon his allegations, holding such allegations of perjury, knowingly used by the prosecutor, to be sufficient. The Court said, at page 496:

> ". . . The petition and response stood nakedly before the trial court as an allegation and a denial that perjured testimony had been knowingly used by the prosecuting attorney to convict appellant and so *presented facially a question of controverted fact.*"

In the instant case petitioner was not denied a hearing, but given full opportunity to prove his allegations, and the full record is before this Court with express findings by the Court against petitioner's contentions.

The case of *Griffin vs. United States*, 183 Fed. 2d 990, is a case in which prosecuting authorities knowingly withheld evidence that deceased had an open knife in his pocket; the defendant having pleaded self defense, uncommunicated threats and an attack upon him by the deceased at the time of the homicide. It was a federal prosecution from the District of Columbia, and the Supreme Court had remanded the case to the Circuit Court for the decision of the substantive question of the admissibility of such evidence. The Circuit Court, overruling a previous holding, held, with one dissent, that the evidence was ad-

missible. It then reversed the District Court, and remanded with instructions to grant a new trial. It should, therefore, be noted at the outset that procedurally, the case concerned the defendant's *motion for new trial on the grounds of newly discovered evidence*, and did not touch upon the question of State deprival of due process under the 14th Amendment rendering a conviction void. Therefore, Judge Edgerton's dicta, cited in petitioner's brief, p. 27, concerning the duties of the prosecution should be read in the light of the fact that he was speaking of a Federal prosecution, by a Federal prosecutor, and of a conviction over which the court still retained appellate and supervisory jurisdiction. Only the subject of federal prosecutions could be involved, and it was not a case where the Court had to find the conviction to be *void* on a constitutionl ground in order to grant relief. The Judge might well suggest a policy, having full supervisory control over the prosecution. This is not to say, however, that he has set out a precise and binding rule for all State prosecutions, the violation of which will void a State judgment under the Fourteenth Amendment.

The Supreme Court has so stated in the case of *Fay vs. People of New York*, 332 U. S. 261, 67 S. Ct. 1613. This Court took occasion to distinguish the rules and policies prevailing in federal prosecutions, and found such cases inapplicable to State prosecutions. The Court held, referring to such federal decisions:

> ". . . but those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice.

> They dealt only with juries in federal Courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in State Courts, and *these expressions of policy are not necessarily embodied in the concept of due process.*"

To the same effect is *Gallegos v. Nebraska*, supra.

The above federal cases are therefore distinguishable on their facts, many involving as they do extreme examples of deliberate fraud, deception of the court, and conduct by the prosecution which was the equivalent of perjury. There is no good reason to apply such holding to the facts of this case, where the strongest element is simply the prosecutor's failure to disclose inadmissible facts, not material to petitioner's defense.

At the very most, Judge Edgerton says that, "when there is *substantial room for doubt*, the prosecution is not to decide for the Court what is admissible or for the defense what is useful."

Certainly, under the State authorities heretofore cited, there was no "substantial room for doubt" as to the admissibility of the evidence. The prosecutor under such authorities, believed that it had no material value in the trial, and had the same opinion after the defendant had concluded his defense.

Certainly the *Griffin* case, including the dissenting opinion, has no application to evidence, not exclusively within the knowledge of the prosecution, but equally available to the defendant, and which was inadmissible under local law.

VI

To Caution a Witness To Answer Only The Questions Asked, But Not To Volunteer Uncalled For Information Is Not Fundamental Unfairness Under The Constitution

The facts in the case at bar certainly fall far short of those set before the Courts in the above cited cases. Here, there was no perjury by the witness or subornation of perjury; there was no deliberate suppression of material evidence by State authorities; there was no fraud perpetrated so as to mislead the Court or counsel. Rather, this case as in many, many other civil and criminal cases, involves simply the usual caution given to a witness that he must in all events tell the truth when he testifies, but in response to specific questions, and not to volunteer evidence which is not called for by the question. This Court well knows it is not only the common practice, but good practice for attorneys to so caution their witnesses, a practice followed by any practitioner experienced in trial work.

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years' ". *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. 599.

It is rudimentary that trial testimony is conducted on a question and answer basis.

> "Answers should be responsive to the question asked, and witnesses are not permitted to

make to the jury *voluntary ex parte statements that are not in response to any questions*, as to facts which are inadmissible." *44 Tex. Juris "Witnesses", Sec. 126.*

Voluntary and unresponsive answers are not permitted, so it is quite proper to so caution a witness. Therefore, it is difficult to see how such a universal, entirely necessary, and legitimate pre-trial practice could amount to fundamental unfairness.

The due process clause of the Fourteenth Amendment, dealing as it does with "life, liberty and property", applies both to criminal and civil cases, and prohibits State authorities, counsel and judges from deprivation of such due process. If the Court should find on these facts that a State has so deprived this defendant of due process under such amendment, by so cautioning a witness, then it will have devious and untoward effects on all litigations as it is now conducted. It would mean that no counsel could safely caution a witness against volunteering uncalled for information, for the fear that such instruction might be a suppression of evidence. Ultimately, it would mean that the State, to be safe must investigate for the defendant and help him try his case, or run the risk of the defendant later claiming he was not aware of any particular evidence, and that such evidence was suppressed, irrespective of the question of diligence in preparing his own case. We do not think the Constitution contemplates any such absurd results.

Certainly, many thousands of cases could fall in this category; untold witnesses have testified strictly in answer to questions asked, leaving unsaid other

inadmissible facts within their knowledge. And certainly any number of defendants now in prison would be entitled to release for the same reason, if due process was deprived under these facts.

VII

Failure To Notify The Defendant Of Facts Which Are Discovered Is Not "Fundamental Unfairness," When Defendant Had An Equal Opportunty To Discover Those Facts.

A. The record shows nothing more than that the witness was cautioned not to volunteer uncalled for evidence before the jury. It does not show that counsel used any wilful fraud or deceit to hide any facts from the petitioner, or to misrepresent such facts to the court or jury.

B. The cases of *Dye*, *Baldi*, and *Ragen*, supra, set forth the following elements constituting fundamental unfairness:

1. Vital evidence bearing on guilt or penalty was within the *exclusive* control of the prosecution, not readily available to the defense in the exercise of due diligence. *Illustration:*

(a) *Dye:* policeman's opinion; (b) *Baldi:* ballistics expert's opinion on bullets; (c) *Ragen:* medical report of doctor that prosecutrix was not raped.

2. The evidence was *directly contrary* to the prosecution's position and other evidence offered in court. *Illustration:*

(a) *Dye:* State put officer on stand to prove defendant sober, keeping away the officer who said defendant was drunk; (b) *Baldi:* State claimed defendant fired fatal shot, knowing its own balistics

expert would testify to the contrary; (c) *Ragen:* State convicted defendant of rape, when medical report showed there was no rape.

3. The prosecutor made overt, fraudulent and deceitful representations to court and jury. *Illustration:* (a) *Dye:* prosecutor said other officers would corroborate first witness; (b) *Baldi:* prosecutor permitted court to charge jury that all witnesses had been called, and failed to answer defense request for bullets; (c) *Ragen:* the fact that there was a prosecution was a fraud.

4. The prosecutor, in view of above, failed to call such evidence to the attention of the court or counsel.

C. Therefore, did the prosecutor violate petitioner's right by his mere failure to disclose his knowledge in this case? The following facts will demonstrate that he did not.

1. It is undisputed that the state had filed its application to subpoena the witness Castilleja four days before trial; that such included his name, address, and telephone number; and that such records were available to counsel, had he asked the clerk to see them. (Original transcript, pp. 183-186)

2. Under Texas law, a defendant is entitled to request an "examining trial" before a magistrate any time before indictment. At such trial he may subpoena any and all witnesses and interrogate them under oath, as a means of *discovering* the facts in advance of the trial on the merits. Arts. 245-266, Texas Code of Criminal Procedure.

3. There is no showing but that when witness testified on the stand, counsel had full opportunity to examine him as to his relations with deceased.

However, counsel did not interrogate the witness either before, during, or after the trial, except to cross-examine him on the stand. (R. 55)

D. Petitioner has avoided the inevitable question: Had trial counsel seriously intended to base a defense on Castilleja's relations with deceased, why didn't he interrogate the witness? It was common knowledge (petitioner surely knew it) that the witness was the last to see deceased alive, and the only one present at the homicide, other than petitioner. What then prevented counsel from interrogating him and ascertaining all the facts? The answer is that *no one* prevented him from fairly ascertaining the facts; certainly the prosecutor did not. Petitioner says that he saw the witness dancing with his wife, and later kissing her at the time of the homicide. Yet on cross-examination counsel didn't even ask the witness if he was *kissing* the deceased at the time of the killing. Petitioner certainly had the right to corroborate what he claimed to see, yet on examining the only living partner to the alleged love tryst, he didn't even ask *if they had kissed.* (R. 156, 157) How anemic then is his claim that he was deprived of the opportunity to inquire about *intercourse* on prior occasions! Petitioner's transparent arguments do not conceal the glaring truth that springs from this record: *petitioner did not diligently exercise the right given him by the State of Texas, and now tries to blame the prosecutor for his plight!*

E. The prosecutor did not instruct the witness to refuse to talk to the defense. This court will never presume fundamental unfairness; similarly it can-

not presume from these facts that the witness, had he been contacted by the defense before trial would have falsified or concealed the facts. Therefore, the prosecution did not have the *animus* or intent that even petitioner's counsel had in instructing the same witness much later, to refuse to talk to the D.A.'s office while the writ hearing was pending. And petitioner's counsel considers such instruction *not to talk* is permissible. (See R. 112)

F. The element of active fraud and deceit is lacking here. The claim is made, that in taking the original statement from the witness before trial (Def. Ex. E, R. 124) without including therein the occasions of intercourse with deceased, amounted to an intent to suppress. But how could it? It was taken for the private reference of the prosecutor as a trial and investigative aid, and in no wise was it intended to be shown to anyone else. Had counsel called for the statement, had it been produced, and therefore an implied representation made that such was the complete knowledge of the witness, a different situation would exist.

G. Therefore, the failure to disclose, or to step forward and volunteer these facts, was not *of itself* fundamental unfairness. Due process is a concept of basic fairness. It was never intended to abrogate the exercise of ordinary diligence by the defense in the trial of criminal cases in State courts. Certainly, under the *Lisenba* case, supra, there was no absence of fairness which *fatally infected the trial*, nor did the prosecutor, in merely keeping his mouth closed, "*necessarily prevent a fair trial.*"

CONCLUSION

Respondent submits that petitioner has wholly failed to carry his burden of proving any denials of due process, and is not entitled to be discharged from his present custody. The findings of the lower court are manifestly correct, and respondent respectfully prays that the judgment be affirmed.

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that should such writ be returned to the Court of Criminal Appeals without the facts accompanying same, or without all of the facts deemed necessary by the Court of Criminal Appeals, said court may designate and direct any district judge or judges of this state to ascertain the facts necessary for proper consideration of the issues involved; and it shall be the duty of the official court reporter of the district judge or judges so designated to forthwith prepare a narration of the facts adduced in evidence upon any such hearing and transmit the same to the clerk of the Court of Criminal Appeals within ten days of the date of such hearing. And it shall be the duty of the district clerk of the county wherein the writ is issued to make up a transcript of all pleadings in such case and to transmit the same within ten days to the clerk of the Court of Criminal Appeals. Provided, that upon good cause shown, the time may be extended by the Court of Criminal Appeals for filing of such narration of facts or transcript.

"The clerk of the Court of Criminal Appeals shall forthwith docket the cause and same shall be heard by the court at the earliest practicable time. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner. . . ."

Art. 135, Texas Code of Criminal Procedure

"The writ of habeas corpus is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact

exists, it is exercised in a manner or degree not sanctioned by law."

QUESTIONS PRESENTED

I

Whether the witness, Castilleja, committed perjury, knowingly used by the State prosecutor, which deprived petitioner of due process of law?

II

Whether the State prosecutor suppressed or concealed material evidence favorable to petitioner, which deprived petitioner of due process of law?

III

Whether petitioner has been deprived of due proces of law because the prosecutor advised the witness not to volunteer any evidence, but to answer truthfully the questions that were asked?

IV

Whether petitioner has been deprived of due process of law because the prosecutor knew before trial that the witness, Castilleja, claimed to have engaged in intercourse with deceased several times prior to the homicide, which was unknown to petitioner, and which facts were inadmissible under Texas law, and failed to divulge such knowledge to petitioner or his counsel?

STATEMENT OF THE CASE

Petitioner's Statement of the Case is objectionable in several particulars; hence, Respondent will make its own statement. In particular, the alleged quotation attributed to the prosecutor (Pet. Brief, p. 10, 11) is not supported by any reference to the record, nor can it be because it is not found in the record, and is believed to be a false quotation of the prosecutor.

Petitioner and his wife, Herlinda, were separated. In May, 1955, petitioner was placed under a peace bond for threatening his wife. (R. 173, 190). On the afternoon of June 18, 1955, the petitioner was drinking beer at a bar with a waitress, and, speaking of his troubles with his wife, said that she did not stay at home and care for the children, and that he was going to "give it to her." He also said that they would "read about me in the papers Monday." (R. 132, 133) After his wife refused a gift tendered by petitioner, he again told another waitress friend that he was going to "get even" with his wife, and then go to Mexico. That this he had decided to do. (R. 139) That same night, the witness, Natividad Castilleja, drove petitioner's wife from town and stopped in front of her home. As the car door opened, petitioner jumped from where he had been hiding, attacked his wife with a knife, and stabbed her some thirty-two (32) times over her entire body. He then ran Castilleja off and drove away in the car, later abandoning the body of his wife in another county. (R. 148-153, 162-165)

Upon his arrest, petitioner gave a confession, in which he states, "the reason I stabbed her was be-

cause she was going out and not taking care of the children." (R. 192) During the investigation of the homicide, a statement was taken from the witness, Natividad Castilleja, relative to his knowledge of the facts surrounding the murder. Def's Ex. E, R. 124) The statement was taken by Pete Torres, an investigator, and shown to Assistant District Attorney Roy Barrera. (R. 77) After completion of the statement, Castilleja admitted having had intercourse with deceased on several occasions prior to the homicide, but denied intercourse on the night of the homicide. (R. 44, 77) Castilleja then asked Barrera what he should say if asked about intercourse with the deceased on the trial, and Barrera told him that he should answer each and every question asked of him on the witness stand truthfully, but not to volunteer any information, and to answer only the questions asked of him. (R. 22, 48-49, 79)

At the trial, the witness Castilleja testified for the state, and in answer to questions, stated that he had given the deceased a ride home "about two times," that he had no dates with her, other than to take her home, and that they were not in love. (R. 142, 156) No questions were asked concerning sexual relations by either counsel.

Defendant testified of the separation from his wife, that she left him and the children for a while, that she went out and left the children at home, and that he had seen her dancing with men. (R. 157-161) On that night of the homicide, he said he had been drinking heavily and saw his wife drive up in front of the house with Castilleja. That he saw the two kissing, and so he started stabbing her. (R. 162-163) When asked if he killed his wife because she

was kissing Castilleja, he replied, "In a way, yes sir; and she wasn't taking care of the kids either." (R. 184)

The jury returned a verdict of guilty of murder with malice, and assessed the death penalty. The judgment and conviction was affirmed by the Texas Court of Criminal Appeals.

On February 14, 1957, an application for writ of habeas corpus was filed in the State District Court, alleging perjury, subornation of perjury, and suppression of evidence by the state.

At the hearing on petitioner's application, Natividad Castelleja was called as a witness by the petitioner. He testified to acts of intercourse with the deceased prior to the homicide, but denied intercourse on the night of the killing. (R. 7) He was not asked about intercourse with deceased upon the trial, and for this reason, did not testify concerning it. (R. 26) Castilleja further testifed that he had not committed perjury during the trial, (R. 21, 63) and that neither Barrera, Torres nor anyone else told him to lie or deny the truth on the witness stand about his sexual relations with the deceased. (R. 67) And he was told not to volunteer answers, but to answer truthfully all questions asked. (R. 48, 49)

In an effort to *impeach* his own witness, Castilleja, the petitioner then introduced at the hearing Def.'s Ex. "B", (R. 119, 9), "C", (R. 121. 15) and "D", (R. 124, 32), which were alleged affidavits of Castilleja taken by petitioner's counsel. The witness, Castilleja, repudiated portions of these statements, denied many of the assertions, and explained the circumstances under which they were taken. (R. 52, 69)

After hearing the evidence adduced, the Judge of the State District Court denied the application and remanded petitioner to the penitentiary. (R. 113) Thereafter, on March 13, 1957, after another hearing on application for a writ of habeas corpus, filed in the Court of Criminal Appeals of the State of Texas, upon the evidence adduced upon the hearing in the Criminal District Court No. 2 of Bexar County, Texas, the Court of Criminal Appeals entered an order denying the application and finding that the record "does not support petitioner's allegations." (R. 207)

The Court, speaking through Judge Morrison, also found specifically that:

> "Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked.
>
> "It was not shown that any of the answers were untrue." (R. 207, 208)

It is such order denying the application for a writ of habeas corpus that the petitioner seeks to review in this Honorable Court.

SUMMARY OF THE ARGUMENT

1. Petitioner alleges a denial of due process, claiming that the witness, Castilleja (1) committed perjury at the trial, (2) which was knowingly used or suborned by the prosecutor, (3) that the prosecutor concealed evidence that said witness claimed to have had intercourse with deceased on occasions prior to the homicide. When he filed his application for writ

of habeas corpus in the State District Court, he received a full hearing at which testimony was taken concerning his allegations, and his application was denied. He next filed a similar application with the Texas Court of Criminal Appeals, which Court denied his application after a review of the record, and specifically found that he failed to prove his allegations. Such procedure was conducted pursuant to Article 119 and 134 of the Texas Code of Criminal Procedure relating to habeas corpus. Under such procedure the Court is fully authorized to review a claim of constitutional deprivation, and to void and set aside a judgment which is contrary thereto. See *Ex parte McCune*, 246 S.W. 2d, 171. The State of Texas, therefore, affords adequate corrective process in the case of constitutional errors, which process Petitioner exhausted in this case. He asks this Court now to review the findings of fact of the Court below, contrary to his allegations.

2. Essentially, this case involves a review of the factual record made below, to-wit, that Petitioner failed to prove prejury, subornation or suppression of material evidence. His burden is to produce "clear proof", and by substantial and credible evidence the facts that constitute a denial of due process. This he has failed to do. The witness, Castilleja, called as a witness to prove such denials, failed to substantiate perjury or that he had been instructed to falsify the facts. Petitioner's counsel then sought to impeach him by introducing several alleged written statements. In the first statement (Def. Ex. C), there is included a recital that the witness had been asked by Alcorta's lawyer at the trial whether he had in-

tercourse with the deceased, and that he replied that he had not, and that he knew he had lied. The witness on the stand, confronted with such statement, readily denied that he had ever made such admission, that no such question was asked at the trial, and, therefore, no such false answer was given. It is apparent from the trial record (R. 156, 157) that the witness was correct, and that no such question or answer occurred during the trial, notwithstanding the alleged statement being used by Petitioner's counsel. Counsel then called the prosecutor, and attempted to secure admissions that he had instructed the witness to deny the true facts or to conceal evidence. Instead, he proved only that the prosecutor had discovered that the witness had had intercourse with deceased on several occasions prior to the homicide, and considered such evidence inadmissible under State law, because such facts were unknown to the defendant at the time of the killing, and could not have motivated him. That he had instructed the witness to answer truthfully the questions asked, but not to volunteer extraneous information. Counsel then sought to impeach the prosecutor by offering news reporters who testified to "out of court" statements allegedly made by the prosecutor. In short, Petitioner relies mainly on the alleged ex parte statements of the witness and the testimony of the news reporters to establish his contention. However, the Judge properly ruled that such evidence was admissible only for impeachment purposes, and, therefore, such evidence under recognized authority has no affirmative or substantial value to prove Petitioner's contentions. Having

failed to prove perjury and subornation, counsel then construes certain answers of the witness as misleading or contradictory. Principally he argues that when he answered he was not in love with the deceased, that his answer amounts to perjury, since on prior occasions he had intercourse with deceased. But intercourse does not necessarily denote love between the parties; consequently, the witness answered to the best of his own belief, and did not intentionally falsify. The proof, therefore, is entirely insufficient, and Petitioner has not carried his burden.

3. This case, unlike many authorities cited by petitioner, is one in which a full hearing was accorded Petitioner, resulting in findings of fact against petitioner. The Court of Criminal Appeals found that the record "does not support petitioner's allegations", that "Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked", and finally, "it was not shown that any of the answers were untrue". (R. 207, 208). Although this Court, on a constitutional question may not be bound by such State findings, nevertheless, they are entitled to great weight, and should ordinarilly be accepted. *Fay vs. New York*, 332, U. S. 261; *Gallegos vs. Nebraska*, 342, U. S. 55. Certainly, they are *not clearly erroneous* under the record in this case.

4. The evidence in question was not admissible under State law, and petitioner, therefore, was not prejudiced by failing to learn of it. It is established under repeated decisions of the Texas Court of Cri-

minal Appeals that prior acts of intercourse, or other bad conduct of the deceased, is not admissible when such conduct was unknown to the defendant at the time of the offense. The reason is that such unknown matters could not affect him, nor weigh upon his mind, nor enter into his motivation for the killing. *Lovett vs. State*, 223 S.W. 210, and other cases cited infra. The same is true even at the instance of the State, for the State is not permitted to show bad conduct of the deceased as a motive for the killing, where such is unknown to the defendant. *Phillips vs. State*, 2 S.W. 601. Petitioner argues that he is entitled to corroborate the facts to which he testified at the trial. However, he failed to testify that he had any knowledge, either personal or communicated, that his deceased wife had had intercourse with the witness. Therefore, under the authorities, there was nothing to be corroborated. Since the evidence was not admissible, which the prosecutor had compelling reason to believe under the authorities, the petitioner did not suffer fundamental unfairness. Nor would the prosecutor be expected to prove during the State's case, evidence which was clearly inadmissible.

5. The Federal cases cited by petitioner, such as *Dye*, *Baldi*, and *Ragen*, are all cases of an extreme nature where the prosecution has deliberately, openly, and fraudulently misled the Court and Jury by keeping out of the evidence completely, exhibits and testimony which were admissible and which would have proved the opposite of the theory of the prosecution. They are a far cry from the instant case where counsel had good opportunity, being apprized

in advance, to consult the witness even before, during or after the trial. He was never spoken to by petitioner's representative except during his brief cross-examination during the trial. He was a San Antonio resident, openly available for anyone wishing to talk to him. Such is quite different from the evidence and witnesses in the cited cases, which were under the exclusive control of the prosecution. Here also, the witness actually testified (contrary to the facts in the cited cases) and petitioner's present counsel is in effect complaining of petitioner's trial counsel's failure to ask the questions that he now deems appropriate. Dicta in the *Griffin* case has application only to Federal prosecutions, and did not relate to a due process question under the Fourteenth Amendment.

6. The Prosecutor here cautioned the witness to answer only the questions asked, but not to volunteer uncalled for information. It is submitted that such instructions are common practice among trial attorneys, and have an obvious and legitimate purpose. Certainly petitioner is not deprived of due process because a witness answers simply the questions that are asked. His counsel was present and had the privilege of asking all the questions he desired. That is the recognized procedure in conducting trials and petitioner has no right to expect a witness to blurt out or volunteer facts that are uncalled for. To hold that such instructions are violative of due process would be to adversely affect all litigation, civil and criminal as it is now conducted.

7. Since petitioner had every opportunity to discover the same facts which the State discovered, it

is not fundamental unfairness to fail to notify petitioner of the disputed evidence in this case. He had a right, prior to indictment, to request an "Examining Trial" where he could subpoena all witnesses and interrogate them in full. He knew or could have known, several days prior to the trial, that Castilleja, the only eye witness to the killing, was subpoenaed as a State's witness. The witnesses' address and phone number were attached to said subpoena records. And yet no efforts were made by the defense to talk to the witness, even before, during or after the trial. Subsequent developments indicate that the witness did not in any way conceal his knowledge, and freely collaborated with petitioner's present counsel in telling all he knew about the case. This Court cannot presume fundamental unfairness and certainly cannot presume that said witness would falsify, had he been asked questions regarding intercourse at the trial, or would conceal his knowledge, had he been interrogated prior to trial by petitioner's counsel. Under the *Lisenba* case there was no absence of fairness which necessarily prevented a fair trial.

ARGUMENT

I.

Texas Has Adequate Corrective Process to Correct Constitutional Errors, Which Process Has Been Fully Used By the Petitioner

The petitioner is here, after having exhausted the remedy of habeas corpus in the State of Texas. He first filed his application in the trial court where the

record of testimony was made, and there being denied his discharge, he filed an original writ in the Texas Court of Criminal Appeals, where it was again denied. Art. 119. *Texas Code of Criminal Procedure*, cited herein, p. 1.

Notwithstanding this, petitioner now claims in his brief, (p. 41) in an attempt to avoid the findings of that Court, that the State has denied him an adequate remedy to review constitutional errors, there being no "*coram nobis*" in Texas. He suggests that the Court of Criminal Appeals holds only that petitioner is without relief in this State. But such is not the holding of that court (R. 206-208), and such is not the law of Texas.

The habeas corpus procedure invoked by petitioner is entirely adequate to review any constitutional errors, and the Court of Criminal Appeals has full power to declare void a judgment which is volative of federal due process.

Art. 134, *Texas Code of Criminal Procedure*, provides:

> "The writ of habeas corpus is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power or where, though the power in fact exists, *it is exercised in a manner or degree not sanctioned by law.*"

Counsel also overlooks the case of *Ex Parte Mc Cune*, 246 SW 2d. 171, where a petitioner sought a hearing before the Court of Criminal Appeals, by writ of habeas corpus under the said Art. 119, supra, and alleged similar grounds of conceal-

ment of evidence as a denial of due process. In addition, petitioner sought to reopen the judgment on the ground of newly discovered evidence. The court held that the latter was an attempt to exercise the common-law writ of *coram nobis*, which was not available in a Texas appellate court. However, the court fully discussed petitioner's constitutional contentions and held at p. 172:

> "There is no question but that this court not only has the power but it is its duty to prevent enforcement of a judgment in a criminal case obtained under circumstances and conditions which constitute a denial of due process of law. . . .
>
> We have examined the facts disclosed by this record, and have reached the conclusion that a *denial of due process to relator is not shown.*"

That is exactly what the court decided in the instant case. Petitioner, therefore, cannot escape the specific findings of fact made by the court, after a careful review of his constitutional contentions and the evidence to support them. The judgment was surely based upon a federal question which petitioner raised, for if it was not, but was based on a non-federal ground, then he has no business in this Court.

Petitioner alleged that his restraint was illegal in that the conviction was *void* on the ground of a denial of federal due process. (R. 197). He has made no claim that he was denied the right to make full proof of his allegations, and can now make no serious contention that the state's corrective process to review his contentions is inadequate. The fact of the matter is, that he has fully exhausted the state corrective

process, has suffered unfavorable findings of fact, now appeals those findings to this court. This case, therefore, will turn on the question of the sufficiency of proof made by petitioner of his extreme allegations, and the correctness of such findings.

II.

Petitioner Has Failed to Prove Purjury, Subornation of Perjury, or Suppression of Material Evidence

A. Petitioner alleges a denial of due process in that the witness, Castilleja, (1) committed perjury at the trial, (2) at the insistence of, or with the knowledge of the prosecutor, (3) who concealed material evidence favorable to petitioner. The burden is clearly on petitioner to establish the facts of the alleged constitutional deprivations. But he has failed to make adequate proof, as the Court below held.

Just what constitutes a denial of "due process"?

> "As applied to a criminal trial, denial of 'due process of law' is the failure to observe that *fundamental fairness* essential to the very concept of justice, and in order to declare a denial of it, the Supreme Court must find that the absence of that fairness fatally infected the trial, and the acts complained of must be of such quality as *necessarily prevent a fair trial.*" *Lisenba v. People of California*, 314 U. S. 219, 62 S. Ct. 280.

And what is the standard of proof required to show a denial of due process?

> "A criminal prosecution approved by the State should not be set aside as violative of due process

without *clear proof* that such drastic action is required to protect federal constitutional rights." *Gallegos vs. Nebraska*, 342 U. S. 55, 72 S. Ct. 141.

". . . it is incumbent upon petitioner in this proceeding, if he is to accomplish his release that he establish by a *preponderance of substantial, credible evidence* not only that perjured testimony was adduced upon his trial, but also, if such be the fact, that it was knowingly produced by the prosecuting officials." *Ex Parte Mooney*. 73 P. 2d 554, 560; cert. den'd 305 U. S. 598, 59 S. Ct. 61.

Petitioner has charged the witness and the prosecutor with very serious offenses. However, while making such extreme charges, he has nowhere pointed to any specific instance where the witness has lied, or made an intentional misstatement. In Texas, perjury is a false statement, deliberately and wilfully made, under the sanction of an oath, which must be a statement material to the issue on trial. *Art. 302, 303, Texas Penal Code.*

B. To understand this record, it is well to understand the events leading up to the petitioner's habeas corpus hearing. The witness in question was a nineteen year old Mexican boy with only a seventh grade education. On the trial of the case he testified truthfully, as will later be shown, to every question that was asked him. Following the appeal, affirmance, and imposition of the death sentence, there followed the usual efforts of friends of the petitioner to secure clemency from the State Board of Pardons and the Governor. From the hysteria which accompanied the repeated denials of clemency, execution dates, and

stays of execution, the events that followed are more understandable, though certainly to be condemned. The witness had casually mentioned to a friend that he had previously had intercourse with the deceased, Herlinda. The witness, a Catholic, was taken before a priest and told, in substance, to confess his guilt. He was also taken before a lawyer (petitioner's present counsel) who told him that he had committed perjury (which in Texas is punishable by death, if committed in a case resulting in the death penalty), but that he should not worry, since counsel, as his lawyer, would defend him. He was told further that it was his fault that Herlinda was dead, and that if Alcorta went to the chair, that his death would also be his fault and on his conscience the rest of his life. (R. 52, 69) Under these circumstances the three purported written statements of the witness were taken, identified in evidence as Def.'s Exs. B, C and D. Having so taken three statements from the witness as his "lawyer", counsel then instructed the witness not to talk to the District Attorney's office, nor to give the State any further statements, and in the event that he was contacted that he should call counsel for "advice".

On the writ hearing, when Castilleja was called as a *witness for petitioner*, he then had his first opportunity to testify openly, and readily repudiated the material portions of these statements, related the above manner in which they had been taken, and steadfastly denied that he had lied at the trial, or that anyone had told him to lie. Petitioner, realizing that the witness proved the very contrary of his

allegations, attempted to impeach him by the introduction of the Def.'s Exs. B, C and D.

At the outset, before examining the testimony in detail, we shall indentify the document which was the source, or the basis of petitioner's original accusations, so widely publicized. Petitioner has claimed below and in this Court, that the witness *admitted* perjury at the instance of State authorities.

In Def.'s Ex. C (R. 122), there is the following statement, attested to by petitioner's counsel, and purportedly made by the witness:

> "I was asked in Court during the trial whether or not I had had intercourse with Linda Alcorta and I said that I had not. I was asked this question by Alvaro Alcorta's lawyer and I knew I was not telling the truth when I said that I had never had intercourse with Linda Alcorta."

The above statement is completely false, as counsel must admit. Not only did the witness in testifying deny making such a statement to counsel (R. 42, 43), but a casual glance at his trial testimony (R. 156, 157) will disclose *that such a question was never asked, and such an answer was never given.* Such is the obvious result of counsel's insistence to the boy that he had committed perjury, and his over-zealous efforts to get him to "confess" it under oath.

C. With such background in mind, let us now examine the testimony on the hearing of the witness Castilleja, and the conclusions that follow therefrom.

1. *The witness testified truthfully at the trial:*

(R. 21)

"Q. Now, Natividad, did you tell the truth when you testified in the trial of Alvaro Alcorta?

"A. Yes, I did."

(R. 63)

Q. (Mr. Semaan continuing:) Isn't it a fact that you didn't admit having intercourse with Herlinda Alcorta, and Alvaro Alcorta's trial was bothering you and was on your conscience?

"A. It wasn't on my conscience, because I told the truth."

Castilleja repeatedly states that he told the truth to the questions asked (R. 28, 46); and that when the State's attorneys questioned him about his prior testimony, that he told them he had testified truthfully (R. 61).

Further, that if he had been asked the question, whether he ever had intercourse with Herlinda Alcorta, he would have answered the question truthfully (R. 27, 47).

Petitioner's brief is replete with statements that the witness Castilleja lied and committed perjury upon the trial, and that the prosecutor questioned the witness concerning intercourse, and received answers which he knew were untrue, and failed to inform the defendant that such testimony was untrue. Now, let's see just exactly how he goes about proving these extreme allegations. In his brief, page

14, he first admits that the witness was never asked the direct question as to whether he had had intercourse with the deceased, which is contrary to the purported statement which he took from the witness (Def.'s Ex. C., R. 122). He then quotes excerpts from the witness's direct examination, (1) where the witness states that he had given the deceased a ride "about two times" from where she was working to her house (R. 142), and (2) where the witness testifies that he and the deceased were not in love, had never talked about love, and had never had any dates with deceased, other than to take her home from work (R. 156). Petitioner says that such testimony is "contradictory", but nowhere points out an intentional or wilful falsehood.

On the writ hearing the witness testified that he had driven the deceased home, and had intercourse with her about four or five times (R. 7). Since he now testifies that such rides numbered "about two times", does this constitute deliberate perjury on a material matter? We think not. The witness is clearly attempting to make an estimate of the number of occasions, did not profess to set an exact figure, and furthermore, he explained (R. 19) that he had in his own mind a distinction between the times that he picked her up after her work and the times when she was not working, such as the night of the homicide that he described upon the trial. Certainly, where a witness, particularly a nineteen year old Latin American, who in some instances may experience difficulty in understanding and speaking the English language, attempts to estimate and recollect the number of rides he gave deceased, he does

not commit deliberate perjury when he says "about two times" on one occasion, and four, five or six times on other occasions. We think it ridiculous to expect the prosecutor to stand up and announce to the court and counsel that his witness has committed perjury, when such a minor discrepancy is found in this testimony. To show such a minor inconsistency in the witness' estimates is not to prove deliberate perjury as alleged. It cannot be argued that on the witness' testimony, taken as a whole, a different verdict would have resulted had he testified "about four, five, or six times" instead of "about two times".

Petitioner next argues that the witness lied when he answered in regard to "love", apparently taking the position that "love" is synonymous with sexual intercourse. Without any attempt to garnish the true facts, it is apparent that the witness claims to have indulged in illicit intercourse with the deceased. However, without being unduly technical, it seems rather naive to argue that a nineteen year old single boy, having illicit intercourse with the married mother of two children, is automatically "in love" with her, or vice versa. However venal a state existed between the two, it is entirely possible and the witness can be genuinely certain in his own mind, that a state of "love" did not exist. Many couples engaging in intercourse profess to share love; many, certainly those that are unmarried, do not profess love. Therefore, we submit petitioner has not convicted the witness of perjury on the above testimony.

The remaining statement, that he never had any dates other than to take her home, does not constitute perjury because of his admissions of inter-

course. He clearly stated that he had intercourse with the deceased, only on such occasions that he brought her home from town. (R. 20).

Therefore, counsel's statement that the witness "could not possibly have been telling the truth in both instances" is not supported either by the record, or by common logic.

2. The witness was instructed to answer all questions truthfully at the trial:

(R. 22)

"Q. What did they tell you with reference to admitting or denying your having intercourse with Herlinda when you took the witness stand?
"A. They told me to tell the truth."

(R. 48, 49)

"(Mr. Barrera continuing:) Natividad, do you remember what it was that I told you about your testimony in court if you should be asked about intercourse in court?
"A. Yes, I remember.
"Q. What did I tell you?
"A. Well, I had to tell the truth.
"Q. I see. What else did I tell you about your testimony in court?
"A. Not to volunteer anything that was not asked.
"Q. Not to volunteer anything not asked of you?
"A. That's right.
"Q. But to answer each and every question on the stand truthfully?
"A. That's right.

"Q. Did you do that?
"A. I did."

(R. 67)

"Q. Now, you say that no one in the District Attorney's Office, Mr. Barrera or anybody else, told you to withhold any evidence about having intercourse with this girl, or to deny it, or not to admit, or anything like that; you say no one told you that?
"A. Nobody." (He gave the same answer at p. 51)

3. *The witness did not testify as to intercourse because he was not asked about it:*

(R. 26)

"Q. All right. Now, Natividad, why didn't you say in court, in the trial of Alvaro Alcorta, why didn't you tell about all these acts of intercourse you had with her?
"A. Why didn't I say it? Well, I wasn't asked.
"Q. Is that your only reason?
"A. Well, yes, because they told me not to volunteer. I wasn't going to volunteer anything they didn't ask me."

(R. 23)

"Q. Well, was it because they didn't ask you, or because Mr. Barrera suggested to you that if you don't want to tell it, you don't have to?

"A. He told me not to volunteer anything they didn't ask me.
"Q. They told you not to volunteer?
"A. That's right.

"Q. And that's why you didn't say it?
"A. Well, because they didn't ask me."

4. *The witness contends he did not have intercourse with deceased the night of her death:*

(R. 7)

"Q. Did you have intercourse with her that night?
"A. No, I didn't.

. . .

"Q. Now, having seen this, I'll ask you again whether or not you had intercourse with Herlinda Alcorta the night she died.
"A. No, I didn't. I had it before, but not that night."

Further, he did *not* tell state authorities that he had intercourse on that night. (R. 44)

5. *The witness repudiated the material portions of the statements introduced to impeach him:*

He repeatedly denied telling petitioner's counsel that he had intercourse the night of the killing. (R. 8, 15, 41, 45)

He denied telling petitioner's counsel that he was asked about intercourse at the trial, and that he testified falsely. (R. 42, 43, 44)

It is obvious from the testimony of the witness, Castilleja, taken as a whole, that he told the truth at the trial to the best of his ability, and that he was never told to deny any facts. As a matter of fact, there is no credible evidence to the contrary. At some

portions in the record petitioner confuses the advice given the witness, should someone question him at *home;* with the advice given as to testimony at the *trial,* and inferring that the witness was told "he didn't have to answer the question." But by now it is quite clear from the record that the witness was instructed and understood that he must answer *all questions truthfully at the trial,* but could exercise his own judgment as to whether to discuss the facts with other persons *before the trial.* (See R. 22, 78, 79.)

6. *Petitioner is bound by the answers of Castilleja when he testified at his instance on the writ hearing in open Court.* The alleged written statements of Castilleja were introduced solely for the purpose of impeachment, and the Court so limited them. (R. 9, 15, 32) Even if they *are prior* inconsistent statements, and in fact serve to impeach the witness, they are not usable as substantive evidence.

> "Under the almost universal practice, well established in Texas, such statements cannot be used as substantive evidence of the truth of the facts stated . . . moreover, if the only evidence of an essential fact is such a prior statement, the party's case will fail for lack of proof." *McCormick & Ray, Texas Law of Evidence,* Sec. 688.
>
> See also: *3 Wigmore, Evidence, Section 1018; Bridges vs. Wixon,* 326 U. S. 135, 150; 65 S. Ct. 1443.

However, the witness denied stating the material matters in the purported affidavits, and thus created

an issue as to whether he in fact uttered prior, inconsistent statements. (R. 8, 15, 41, 42, 44).

Petitioner in his brief (p. 40) claims the right to impeach the witness as he was "hostile, adverse, and unfriendly." But this is not so. He called the witness without any reservations, to prove the truth of his allegations. (R. 1) He was armed with a battery of alleged statements he personally had taken from the witness, having promised the witness he would defend him from perjury charges. (R. 69) He further instructed witness not to give the State any affidavits, but to see him for "advice" when questioned, which instructions the witness observed. (R. 52, 69) The contrary is apparent, therefore, that such witness became adverse only after he testified in open court, but on past performance was clearly "friendly" when he was called. It was, under their arrangement, an instance of a witness called to testify by his own attorney or confidant.

That his testimony was adverse to petitioner, does not remove its probative force. If petitioner could impeach, he could not do so under the rule concerning an *adverse* witness or party, but only on the ground of *surprise*, where one *is* permitted to impeach his own witness. But, whether bound by the testimony or not, as a matter of law, it still remains as credible evidence which negates the bulk of petitioner's contentions, and the impeaching evidence can have no substantive or probative force whatever in proving his contentions.

D. Petitioner next called the prosecutor, Roy Barrera, and sought to force him to admit making a particular statement before the Board of Pardons.

Being asked in regard to the purported statements before the Board, that in his opinion the evidence in question was not admissible, Barrera replied,

> "A. I told him that in addition to the proposition which is not in there, that he should not and must not volunteer any information unless a question was asked of him; in which event, certainly, he had to tell the truth.
> "Q. All right. You told him not to volunteer that?
> "A. That's correct.
> "Q. Unless it was asked of him?
> "A. That's correct." (R. 72, 73).

On being asked if he had told the defendant that the testimony given was not true, Barrera replied:

> "A. The testimony I heard from the witness stand, insofar as I heard and insofar as that record reflects, *was true.*
> "Q. As far as you're concerned.
> "A. That's true, and insofar as the record is concerned." (R. 76).

Barrera further testified that he told the witness not to volunteer *any* testimony, whether of intercourse or otherwise. (R. 79).

E. Not being satisfied with the prosecutor's testimony, petitioner then sought to *impeach him* by the testimony of news reporters who were present at the hearing before the Board of Pardons. The witness Stewart Long (R. 82) testified that Barrera admitted that he was the one who cautioned the witness Castilleja, that he had stated his opinion as to the inadmissibility of the evidence. He admitted hearing

Barrera's full statement to the effect that he instructed the witness *not to volunteer* any information, and to answer each and every question *truthfully* on the stand.

Next, the reporter Van Slycke testified to fragments of the Board proceedings that he heard. He admitted that his handwriting was a little vague in his notes, and admitted omitting certain qualifying statements of Barrera. (R. 85, 86). He explains his inability to report Barrera's full statements, by saying, ". . . . for my news reporting I did no think they were important. They may be important in a legal sense." It is on such sorry evidence the petitioner relies to show a denial of constitutional rights and void a state conviction. See Petitioner's Brief p. 39.

Petitioner's intent is obvious from reading both news reporters' testimony. That is, that he was attempting to use some unidentified story in the local newspaper as the source of the purported admission by Barrera. Needless to say, the garbled and admittedly fragmentary testimony of the news reporters by referring to sketchy notes made some weeks before, (i. e., R. 90) and allusions to a newspaper article, all offered for the purpose of impeaching Barrera, if it does, and being hearsay based on hearsay, does not rise to the dignity of substantive evidence required to disturb a judgment of the State court on constitutional grounds.

The investigator, Pete Torres, testified for the State as being present when Barrera was conversing with the witness Castilleja. He took the original statement (Def.'s Ex. E, R. 124) from the witness in writing. (R. 98, 99) After completing the state-

ment he contacted the prosecutor, Barrera, suggesting further questioning in regard to his relations with the deceased. The witness then admitted intercourse on several prior occasions, but denied intercoure on the night of the homicide. Then the witness asked what to do if someone came to his *house* to see him. The witness was then instructed by Barrera as to his rights, that he could or could not discuss the case with them, as he chose. He also explained how his credibility could be damaged if he gave an additional written statement. The witness then asked, "What shall I say in court?" The prosecutor replied, "Whatever they ask you in court, tell the truth to whatever they ask you in court, but don't volunteer anything unless they ask you." (R. 100; also Barrera at R. 79)

Torres further testified that he contacted the witnes on January 25th, when a story appeared in the newspaper to the effect that counsel had taken a statement from him. (R. 102). He told Torres that he was warned that Alcorta's death would be on his conscience unless he did something about it, and that's why he gave the statement. (Def.'s Ex. C). On being asked to give the State a statement, correcting matters that had been reported in the paper, he replied that he thought not, since the attorney had instructed him not to. (R. 104)

It is significant to note the persons that petitioner did not call to testify. He did not call Mr. E. P. Lipscomb, who was present (R. 1) and who was petitioner's *original attorney on the trial* of the case. Consequently, there was no testimony that Lipscomb was unaware of Castilleja's testimony, or that he made any efforts whatsoever to speak to the witness be-

fore, during, or after the trial, to ascertain his knowledge of the case. Lipscomb offered no rebuttal to the testimony of Castilleja, that Lipscomb had never at any time sought to discuss the case with him (R. 55). Nor was there any testimony that had he known of the disputed evidence, that he would have offered it into evidence, or that he considered it material to any defense.

Petitioner did not call Father Duffy, Ascencio Castilleja, Alex Coy, or any other purported witnesses to the written statements taken by counsel, to support them after Castilleja repudiated them. Counsel himself was the only one who testified in support of them.

Petitioner is forced to stand on hearsay, ambiguous reports of so called "admissions" by the prosecutor, and portions of ex parte statements offered for impeachment, and then repudiated by the witness. Such is a far cry from the "clear proof", by a preponderance of "substantial and credible evidence", required to void a state conviction. His most frequent contention is that his case is proved by those who, with admitted inaccuracy, profess to report the out of court utterances of the prosecutor. But as already shown, such hearsay on hearsay, offered for impeachment purposes is incompetent to prove anything, and a case which rests on such evidence must fail.

The petitioner also attributes devious and underhanded motives to the prosecutor in asking the witness Castilleja the questions concerning "love". The questions were asked merely to elicit from the witness a lack of prejudice against the defendant and the removal of the motive on the part of the witness to give false or colored testimony.

These questions were asked immediately prior to the witness being passed for cross-examination and at a time we must assume that the defense attorney was fortified with knowledge imparted by the defendant that he, the defendant, had observed the witness and the deceased "kissing and hugging" each other. It is only reasonable and common-place to assume that the defense would develop the relationship that existed between the witness Castilleja and the deceased Herlinda Alcorta, had they intended to defend on such grounds. And in the absence of such development we must assume that the defense attached no importance to it and was defending on *other* grounds.

III.

The Factual Determination By The State Court Is Entitled To Weight.

Certainly, by a careful review of the entire testimony at the hearing, it is impossible to find any substantial evidence of wilful perjury, of subornation of perjury by the prosecutor, or improper "suppression". The Texas Court of Criminal Appeals found that, "The record of said hearing is before us and it does not support petitioner's allegation, nor is it shown therein that the conviction is void, as alleged." (R. 207) It also found as a fact that, "Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked." and further, that, "It was not shown that any of the answers were untrue." (R. 207, 208) The above

findings of the Texas Court, based upon briefing, argument, and careful examination of the written record, is entitled to *great weight* by this Court. Such is the holding of *Fay v. New York*, 332 U. S. 261, 67 S. Ct. 1613. Also see *Gallegos v. Nebraska*, 342 U. S. 55, 72 S. Ct. 141, wherein the Court holds at p. 60:

> "While our conclusion on due process does not necessarily follow the ultimate determinations of judges and juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded to State agencies to appraise the weight of the evidence, because the witness gave it personally before them, *leads us to accept the judgment insofar as facts upon which conclusions must be reached are in dispute.*"

The Court there further held that it would examine the *undisputed facts*, but said (p. 61):

> "As State Courts also are charged with applying constitutional standards of due process in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened."

Respondent does not say that this court is bound to view the record in the same manner as did the state court, nor must it accept the findings of fact in all cases. However, we do say that the matter is largely one of sifting the testimony of a number of witnesses, analyzing alleged contradictions and separating that evidence which has substantive value from that

which has none. The district judge who heard the testimony on the hearing, who observed the witnesses as they testified, and formed opinions as to their credibility, had to make such a determination, and did so against the petitioner. The Court of Criminal Appeals, in reviewing the record and applying the law had to make the same determination. This is not an original proceeding in the Supreme Court, nor an original proceeding under any of the federal statutes, but rather it is to *review* the judgments of the state courts. Therefore, it is submitted that in observing the comity between state and federal government, while at the same time exercising its prerogative of review over constitutional questions, this court should give great weight and consideration to the *factual findings* made below. And unless they are clearly erroneous under this record, they should not be overturned.

And, as they are not without factual foundation, they should be accepted. *Fay Roofing Co. v. Wood*, 344 U. S. 157, 73 S. Ct. 204.

The constitutional rights which override all other questions, have been carefully guarded through the years, and sparingly exercised to strike down the deliberate judgments of state courts. Therefore, such a privilege should not be prostituted by invoking these beneficent provisions in a state of facts so unsatisfactory, so weak and so lacking in probative force as the petitioner has here presented. It must not be forgotten that petitioner is not the only person who has rights in this matter. The witness, Castilleja, and the prosecutor have been accused of extremely seri-

ous, and even felonious offenses. They must not be "convicted" of these charges by mere speculation, insinuation, and other matters not amounting to credible evidence.

IV.

The Evidence In Question Would Not Have Been Admissible Under State Law, and consequently petitioner's failure to learn of it could not constitute fundamental unfairness.

A., *Evidence of the witness' prior acts of intercourse with the deceased was immaterial and inadmissible, where such acts were unknown to the defendant at the time of the killing.* Petitioner in the proceedings below and even in this court has taken two contradictory positions. First, he alleges that such acts were unkown to the defendant at the time of trial (R. 7); and secondly, he alleges at least in a general way, that petitioner was aware of his wife's conduct with the witness Castilleja at the time of the killing. Of course, there is reason for such inconsistency, since in properly alleging a constitutional question, he must say that such evidence was unknown at the time of the trial, and the State failed to apprize him of it. However, on the question of materiality of evidence on the trial, he must say that such facts were known to petitioner and, consequently, entered into his state of mind at the time of the killing and was, therefore, admissible.

Petitioner creates his own dilemma: If he knew about this evidence in advance, then as a matter of law there can be no suppression or concealment of it which prevented a fair trial.

However, the record unquestionably shows that petitioner was not aware that deceased had had sexual relations with Castilleja on several prior occasions, in accordance with petitioner's statement of the "Questions presented". (Petitioner's Brief, 7), and similarly reflected in petitioners original Appli cation for Writ of Certiorari, page 3, that such information was "unknown to the defendant at the time."

The Supreme Court has held that State rules of evidence shall prevail in determining such constitutional questions as are presented here. *Gallegos v. Nebraska*, supra; *Griffin v. United States*, 336 U. S. 704, 709; 69 S. Ct. 814.

The Court of Criminal Appeals of Texas has consistently held that such prior acts of intercourse, or of infidelity, or other bad conduct by the deceased, is inadmissible where such actions and conduct were unknown to the defendant at the time of the offense, and hence, could not have contributed to his motivation or state of mind. *Meyer v. State*, 41 S. W. 632 (Tex. Cr. App.); *Young v. State*, 127 S. W. 1058 (Tex. Cr. App.); *Hall v. State*, 158 S. W. 272 (Tex. Cr. App.); *Weige v. State*, 196 S. W. 524 (Tex. Cr. App.); *Perea v. State*, 227 S.W. 305 (Tex. Cr. App.); *Lovett v. State*, 223 S. W. 210 (Tex. Cr. App.); *King v. State*, 286 S. W. 231 (Tex. Cr. App.); *Newchurch v. State*, 121 S. W. 2d 998 (Tex. Cr. App.); *Lacy v. State*, 128 S. W. 2d 1165 (Tex. Cr. App.)

It is apparent from the defendant's testimony on the trial that the acts of intercourse between the witness Castilleja and defendant's wife were unknown to him. The defendant testified on the trial that although he had seen his wife dancing with Castilleja

on a previous occasion, that this did not mean that there was anything wrong, and he had to be sure. He said he had never seen them do anything wrong until the night of the homicide, when he "saw them there" kissing, and more specifically, in answer to a question on cross-examination, he testified that he killed his wife, in a way, because she was kissing Castilleja and because she wasn't taking care of the children either. (R. 183, 184)

In *Young v. State*, supra, the Court held that where the accused killed deceased on his first meeting with him after learning of his insulting conduct toward wife of the accused, evidence of the criminal relations between the wife and deceased not known to the accused was inadmissible.

The case of *Weige v. State*, supra, stands for the proposition that matters of which the defendant had no knowledge are inadmissible,, where it is sought to use such matters as having affected defendant's mind at the time of the homicide, the Court specifically holding:

On page 525:

> "We doubt the admissibility of this evidence (that appellant's father had had relations with appellant's wife, the deceased) under the circumstances. The rumor would manifestly not be admissible unless appellants' knowledge of it was proved by direct or circumstantial evidence . . . Where known to a defendant in a criminal case, and where they relate to relevant matters, they may become admissible, and in this case we think would be admissible, *if knowledge of their existence on the part of appellant was satisfac-orily shown in evidence. . .*"

In *Perea v. State*, supra, the facts showed that the defendant killed two hunting companions. Upon his trial for killing the woman companion, he defended partially on the ground of sudden passion amounting to manslaughter and sought to show illicit relations between the woman and man companions whom he had killed as showing his state of mind in viewing alleged threats on the part of the deceased. In this case, the Court held the evidence inadmissible and irrelevant, stating that the defendant did not claim to have *had any knowledge* regarding such illicit relations between his companions, nor were such relations referred to prior to the killing, or that he claimed he was influenced to kill the woman by reason of such facts.

In the case of *Lovett v. State*, supra, from the facts it appears that the daughter of the appellant, just before her father shot and killed the deceased, informed her father that the deceased had outraged her and had had intercourse with her. This was the extent of the information she conveyed. The State undertook to go into all incidental matters and invironments that occurred between the daughter and the deceased. In holding that the evidence was inadmissible, the Court of Criminal Appeals of Texas stated:

On page 211:

> "We are of the opinion that the State ought not to have been permitted to go that far under the circumstances of this case. *Matters unknown to the defendant could not affect him, nor weigh upon his mind, viewed from the standpoint of adequate cause and sudden passion.* The things which are known and which enter into the adequate cause which produce passion are proper

subjects of inquiry, *whether they tend to enhance passion or minimize it.* It is the condition of the defendant's mind at the time he acts, and the cause which produce that condition of mind, that enable the jury to view it from the defendant's standpoint. It is from this viewpoint he acts."

In *King v. State*, supra, the Court of Criminal Appeals affirmed the exclusion of evidence showing acts of criminal intimacy between the defendant's wife and the deceased in the absence of a showing that these matters had been *brought to the attention of the appellant prior to the homicide.*

The case of *Newchurch v. State*, supra, held that the trial court properly excluded testimony of prior indecencies of the deceased toward the defendant's daughter where the deceased's conduct was unknown to the defendant, the Court stating:

At page 1000:

"We do not believe that the testimony was admissible for the reason that *if he had no knowledge thereof*, it had no bearing on the appellant's state of mind and could not have induced him in any way to commit the act."

The case of *Lacy v. State*, supra, disposes of petitioner's contention that the evidence of intercourse would be admissible to corroborate his testimony that they were kissing. In this case, the Court held:

On page 1170:

"In order to show what was operating on his mind the appellant had the right to offer matters corroborative of the statements made to him by Beasley, but certainly had not the privilege of

> going into *certain details of such transactions* as were not known to him at the time of the claimed duress; but he should have been held only to such matters as were operating on him at the time of the exercise of such claimed duress by Beasley . . ."

In Alcorta's case, he could corroborate those matters known or communicated to him (such as dancing with men, going out and leaving the children); but could not corroborate those "certain details of transactions" unknown to him (such as prior acts of intercourse).

B. Not only is such evidence inadmissible on behalf of the defendant, but *it is also reversible error for the State* to attempt to show indiscretions of the deceased, as a motive for the killing, where such indiscretions were unknown by the defendant.

In *Phillips vs. State*, 2 S. W. 601, the Defendant had killed his wife, and the State was permitted to prove that the deceased was not virtuous, and that she was unfaithful to the defendant, her husband. Objection was made on the ground that knowledge of such indiscretions was not brought home to the defendant. The Court reversed and remanded, holding:

> "For the single purpose of showing motive, the evidence was admissible, if it was accompanied with proof satisfactorily showing that the defendant, at the time of the murder, had knowledge of the improper conduct of his wife. It was not admissible for any other purpose, not even for this purpose, unless a knowledge of the facts by the defendant before the murder was shown to exist. *Unless such knowledge was*

shown; such evidence was wholly foreign to the issue, was manifestly irrelevant, and should have been excluded."

To the same effect is *Black v. State*, 198 S. W. 959.

This disposes of petitioner's contention that the prosecutor had the duty of proving to the jury the deceased's sexual indiscretions with Castilleja, which were unknown to the defendant at the time of the killing. It is evident that the rule of exclusion works both ways. In other words, since such indiscretions, unknown to the defendant, could not, therefore, affect his state of mind at the time of the killing, such evidence is inadmisisble on behalf of the defendant to show mitigation, or on behalf of the State to show motive, where motive may otherwise be lacking. And as stated in the *Lovett* case, supra, such unknown matters would serve neither to enhance passion, nor to minimize it.

It is evident that the defendant could have defended on a number of grounds, to-wit: insanity, temporary insanity, or that death resulted from the rock thrown by Castilleja, as the defendant in fact contended in his testimony. Therefore, for the State to have proved at the outset that the deceased had been unfaithful to her husband, without showing his knowledge, could have been extremely prejudicial and harmful to the defendant, since it would tend to show premeditation, design and reason, for an intentional, voluntary, and malicious killing. It would not, therefore, be reasonable to hold that the failure of the State to introduce the evidence amounts to unconstitutional suppression of evidence, where under State law such proof would constitute reversible er-

ror. We think the prosecutor, in warning the witness not to blurt out involuntarily such inadmissible matters, did not violate any duty, but rather discharged a high duty in following the law as he understood it, and protecting the record from inadvertent reversible error. It is of little moment, now, for the petitioner, represented by different counsel, to claim that such evidence would have benefited him. The fact remains, judged at the time of the actual trial, that petitioner's trial counsel might well have objected to the evidence, for it was objectionable, to the State's showing a strong motive entirely inconsistent with possible defensive theories.

C. The case of *Thompson v. State*, 29 S. W. 2d 343, which is the only case cited by the petitioner in support of his contention that the evidence was admissible, is readily distinguishable from the instant case on the ground that, in the Thompson case, *the defendant sought to prove the truth of a fact known to him which had been communicated to him prior to his action.* This knowledge in the defendant distinguishes the Thompson case from the case at bar.

The holding of the *Thompson* case is limited to proof of the truth of the "matter relied upon by him in mitigation" under the issues present in that case. In that case the witness Hemphill testified of a conversation with deceased that deceased had ruined another girl, that he was now going with defendant's daughter, and intended to separate her from her husband. Evidence had already been admitted to the effect that Thompson knew that the deceased had made the Buckley girl pregnant. This, says the court, was admitted apparently without objection to show the defendant's state of mind and the fact that

his married daughter was keeping company with a man of such low morals. When Hemphill testified of his conversation with deceased, which was *conveyed to defendant*, he was vigorously cross-examined, and the State contended that his testimony was a fabrication. Under such circumstances, the court held that the defendant was entitled to the testimony of the Buckley woman, to the effect that she was *in fact* pregnant by the deceased. The court said, "If the communication to appellant of the fact of Miss Buckley's pregnancy by deceased was admissible, as seems to be conceded, and we think correctly so, then it would logically follow that corroborative evidence tending to prove its truth was likewise admissible if and when an issue arose as to its truth, or as to the fact of such communication being made. (29 S. W. 2d. 344

In this case, there is no evidence of any communication to petitioner that his wife was having relations with Castilleja, consequently, there was no issue as to the truth of the facts in such communication and no issue as to whether such communication had in fact been made.

D. The evidence is not admissible by virtue of Article 1257a, Penal Code of Texas, cited in petitioner's brief. Such statute is merely a permission to offer relevant facts concerning the previous relation between the *accused* and the deceased, together with other facts showing the "conditon of the mind" of the accused at the time of the homicide. It does not purport to change the otherwise established rules of evidence as to what is admissible in showing state of mind. *Wheeler v. State*, 239 S. W. 2d. 105; *Scott v.*

State, 190 S. W. 2d. 828; *Childress v. State*, 202, S. W. 2d. 930; *Howard v. State*, 55 S, W. 2d. 1048.

E. Petitioner infers that such evidence might be admissible because the State first opened up the matter by calling the witness Castilleja to the stand, and asking the question shown by the record (Petitioner's Brief, 28-29). However, this forms no predicate for the admission of the evidence in question. If we assume, as the above cases have held, that the prior relations of the witness and deceased, unknown to defendant, were immaterial, then the questions by the State as to whether the witness was "in love" with the deceased, etc., was also immaterial at that point. The Texas cases hold that the introduction of such immaterial matters by the State without objection does not form a predicate for the admission by the defendant of additional evidence of the same character. *Howard v. State*, 55 S. W. 2d. 1048 and *Scott v. State*, 20 S. W. 2d. 426, the latter case holding:

> "Where the defendant on trial fails to object to immaterial and prejudical testimony, he may be estopped to afterwards contradict it. *He cannot thus make an issue of an immaterial matter which had no proper place in the trial.*"

The evidence in question was clearly inadmissible, and under the law of Texas, above discussed, the prosecutor had every good reason to believe that it had no place in the trial, either for the State or for the defendant, and therefore his cautioning of the witness not to volunteer inadmissible testimony did not constitute fundamental unfairness. It was not a material matter under the Federal cases cited by

petitioner, and petitioner was therefore deprived of nothing that he would have been entitled to had he known of the evidence. There is no good reason to grant petitioner a new trial, since upon a new trial this evidence would not be admissible.

V.

The Federal Cases Cited By Petitioner Concerning Due Process Do Not Govern The Facts In This Case.

The petitioner has simply quoted at length selected portions of the federal opinions cited, without discussing the facts upon which said opinions were based.

As stated herein, the respondent does not question the rule of law decided and enuciated in the landmark case of *Mooney vs. Holohan*, 294 U. S. 103.

There, the Supreme Court simply held that petitioner had failed to invoke the State court remedy of habeas corpus and denied leave to file his petition for an original writ of habeas corpus in the Supreme Court. But the Attorney General had demurred to the application, in substance admitting the truth of the allegations, and denied that a Federal question was presented. The Court, however, held by way of dictum, that the requirements of due process were broader than that contended by the Attorney General, and would invalidate a conviction which was contrived by State authorities with the knowing use of perjured testimony, deliberate deception, and suppression of material evidence. The petitioner, Mooney, later filed his application for a writ in the California Supreme Court, and it was denied on the

ground that he failed to prove his allegations. *Ex Parte Mooney*, 73 Pac. 2d 554, cert. den'd, 305 U. S. 598, 59 S. Ct. 61. The proof showed that the principal witness, long after trial, executed an affidavit repudiating his testimony. Petitioner alleged that the witness called counsel's office, stated he had perjured himself at the District Attorney's direction, and thereupon executed the affidavit which constituted one of the principal "props" supporting petitioner's case. Such facts, and the Court's comment, strikingly resemble the background in the instant case. The Court said :

> "Subsequent developments tend to indicate that McDonald's "voluntary" decision to purge himself was induced or at least influenced by circumstances that cast suspicion thereon." (Page 563)

The Court on abundant evidence, rejected such repudiation, and found that said witness had told the truth at the trial, even though he later testified that he had committed perjury. The Supreme Court there denied certiorari on the state court's findings. How stronger is the instant case, where the witness does not stand on his affidavit of repudiation, but testified that he had told the truth consistently, and has never admitted perjury.

The case of *United States Ex rel. Thompson vs. Dye*, 221 Fed. 2d 763, is an extreme case on the facts, where a writ of habeas corpus was granted. There, the Circuit Court found that the District Judge erred in holding the evidence was not vital to the defense. The issue was one of intoxication of the de-

fendant, which if true, could have reduced the charge to second degree murder, and be material to the penalty under State law. The prosecutor called only one police officer to testify to the defenddant's condition, which witness emphatically denied that defendant was drunk. The prosecutor then excused another officer, Heagy, knowing that Heagy would testify that defendant *was* drunk at the time of his arrest. He then compounded such deceit, by openly stating to the court that such State's absent witnesses would only corroborate the other State witnesses. On such extreme facts, Judge Hastie cautioned that "no unduly broad implications be read into this decision", and stated that "this is an area in which the question of fundamental fairness depends so much upon the facts of the particular case that a precise rule cannot be devised."

In *United States Ex rel. Almeida vs. Baldi*, 195 Fed. 2d 815, the Circuit Court affirmed the granting of a writ of habeas corpus on the ground of deliberate suppression of evidence, vital to the defense. The facts showed that a policeman was killed during a robbery attempt by several armed robbers. The State introduced evidence to show that Almeida fired the fatal shot, and the defense sought to establish by cross-examination that someone else, possibly a policeman, fired the shot. The jury found him guilty, and assessed the death penalty. The State did not put in evidence known proof that defendant was armed with a .45 caliber weapon, and that the deceased was killed with a .38 caliber bullet. The prosecutor did not call the various police officers and experts familiar with the evidence of the bullets, al-

though the jury was charged, under Pennsylvania law, that the prosecutor had called, "all the witnesses that he could find." Counsel alleged that this evidence could not have been obtained without the help of the prosecution, that they had inquired of the prosecutor as to whether other bullets had been recovered, and no reply was forthcoming. Consequently, the prosecutor deliberately proceeded with the trial on the theory that defendant had fired the fatal shot, which fact he knew from his own policeman was false. Furthermore ,the Court based its decision, in part, upon the want of discovery procedures available in Pennsylvania. The Court said:

> "It must be borne in mind that in Pennsylvania there is no discovery in a criminal case and we are of the opinion that his counsel cannot be justly accused of lack of *due diligence* in failing to find sources of evidence and evidence so well concealed."

Such is certainly not the case in Texas, where a defendant has the opportunity of discovering the knowledge of all witnesses, by the examining trial procedure, discussed infra, page 56.

The Court further commented on the State court's refusal to grant the writ, when the Court took no testimony and made no findings, saying, "Under such circumstances the allegations of the petition that vital evidence 'was wilfully concealed' *must be taken to be true* since no hearing was had." In the instant case, a full hearing was had, after which the

Texas Court of Criminal Appeals refused the writ, upon specific findings that the factual record did not support the allegations. Certainly, under the extreme facts above, the Court had no alternative but to grant the writ, assuming the allegations were true, the evidence showing that another, not the defendant, had killed the deceased. It rather demonstrates a case of deliberate suppression of evidence, wholly unavailable even to diligent counsel, and constituting a fraud on the court. Such is entirely distinguishable from the instant case which concerns facts within the knowledge of a lay witness, who did testify, and who was equally available to petitioner's counsel in ascertaining such facts. (See argument, p. 55.)

The case of *United States Ex. Rel. Montgomery vs. Ragen*, 86 Fed. Sup. 382, by a District Court, is a decision no one can dispute. There a Negro was convicted, and served twenty-five years in the pen for the rape of a white woman. This took place in the heyday of the Ku Klux Klan, when the defendant was prosecuted amid a background of threats, physical violence and intimidation of his own trial attorney. The prosecutrix was a mental deficient, and who stated that she had never before seen the defendant. The State had in its possession evidence of a medical examination of the prosecutrix, which showed that she was still a virgin, and was not raped. The awful result was, that defendant was convicted and sentenced to life imprisonment, for a crime *that was never committed!* The Judge, therefore, uses understandably strong language, which is cited ex-